



1-1-2019

Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media so Long

Susan B. Long

Harry Hammitt

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Law Commons](#)

Recommended Citation

Susan B. Long & Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media so Long*, 63 Vill. L. Rev. 895 (2019).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol63/iss5/6>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.

2018]

INCREASED USE OF THE FREEDOM OF INFORMATION ACT BY
THE MEDIA: EXPLORING WHAT TOOK THE MEDIA SO LONG

SUSAN B. LONG & HARRY HAMMITT*

THE Freedom of Information Act (FOIA)¹ was passed by Congress in 1966 and became effective in 1967. Even though the media was the primary institutional supporter of efforts to amend the Administrative Procedure Act (APA)² to include a greater right of access to government information, the press never enthusiastically embraced the use of FOIA, primarily because its unwieldy administrative process has routinely resulted in long delays in actually receiving records, delays that often make it useless for deadline reporters.

Recently, however, a pronounced upsurge in media-filed lawsuits has occurred. More than one out of every ten federal FOIA lawsuits are now brought by reporters and news media organizations. This article will analyze the statistical data on the recent increase in the use of FOIA litigation by the media, while exploring the strange road that led to this development.

I. RECENT UPSURGE IN MEDIA LAWSUITS

Detailed data tracking media-filed suits are now available because of the research of the FOIA Project, an initiative of the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. The FOIA Project systematically identifies and annotates each new FOIA case as soon as it is filed, and then compiles detailed information following each of these suits. The records gathered include the complaints filed in each case, opinions reached, and the complete docket entries. In addition to writing short descriptions about each case, each lawsuit is tagged by the legal issues involved and categorized in other ways.

Recently the FOIA Project launched “The News Media List” initiative to track just how often the news media takes federal agencies to court to enforce FOIA requirements. Starting with the case-by-case records for virtually every FOIA suit filed since October 2000, the project team examined

* Susan B. Long is founding Co-Director of the Transactional Records Access Clearinghouse (TRAC) at Syracuse University and Associate Professor of Managerial Statistics in the Martin J. Whitman School of Management at Syracuse. She also co-directs FOIAproject.org. Harry Hammitt is editor/publisher of Access Reports, a bi-weekly newsletter on the Freedom of Information Act and government information policy. He is also the primary editor of “Litigation Under the Federal Open Government Laws.”

1. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)).

2. Administrative Procedure Act, Pub. L. No. 79-404, 60 STAT. 237 (1946) (codified as amended at 5 U.S.C. § 552 (2018)).

and classified each of the over ten thousand individual names of plaintiffs in these suits to identify those who were media related.³

An analysis of “The News Media List” data confirmed that media-filed lawsuits were relatively few during the first twelve years of available data, covering FY 2001-FY 2012. There were modest year-to-year fluctuations in media litigation activity—sometimes slightly up, other times slightly down. But all in all, the level of media-filed suits over these 12 years remained essentially unchanged. Media filings during this 12 year period averaged roughly 12 per year. These cases represented only 3.5% of all federal FOIA lawsuits.

However, starting in 2013, media-filed FOIA lawsuits started to increase: 21 in FY 2013, 39 during FY 2014, and 56 in FY 2015.⁴ While the number fell to 35 during FY 2016, during just the first four months of the Trump Administration, 45 new FOIA lawsuits filed by 60 media plaintiffs already have been filed.⁵

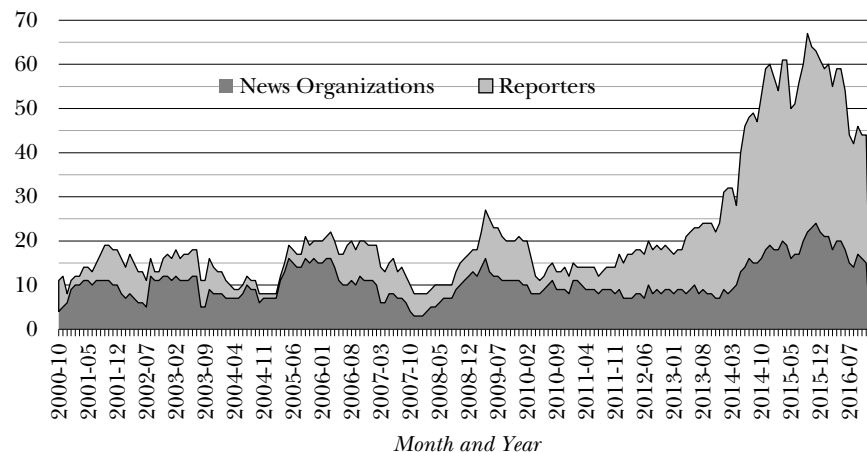
These general trends are shown in the time series graph below. Plotted is the moving yearly average of media plaintiffs filing suits. Even though during the same period there has been an overall rise in the total FOIA litigation filed by all parties, the share accounted for by media-filed suits has still grown to account for more than one out of every ten cases.

3. This list focuses on organizations that hold themselves out as news media, and reporters for whom this is their profession. See *The News Media List*, THE FOIA PROJECT, <http://foiaproject.org/plaintiff-media-list/> [https://perma.cc/R8HE-PNQ8] (last visited Oct. 30, 2018). A separate directory compiled by the FOIA Project covers suits filed by nonprofit and advocacy groups. See *The Non-Profit List*, THE FOIA PROJECT, <http://foiaproject.org/plaintiff-nonprofit/> [https://perma.cc/E3HR-AEEB]. Many of these latter groups also qualify for lowered processing fees under the FOIA statute’s broader definition of media status.

4. See *News Reporters Drive Growth in Media FOIA Litigation*, THE FOIA PROJECT, <http://foiaproject.org/2017/01/09/news-reporters-drive-growth-in-media-foia-litigation/> [https://perma.cc/QL9T-DE5P].

5. See *The News Media List*, THE FOIA PROJECT, <http://foiaproject.org/plaintiff-media-list/> [https://perma.cc/BUU7-5W54] (providing 2016 statistics) (last visited Oct. 30, 2018); *Media-Filed Suits Seek Records from the Trump Administration*, THE FOIA PROJECT, <http://foiaproject.org/2017/05/31/media-seek-records-from-trump-admin/> [https://perma.cc/5WU7-TVSX] (providing 2017 statistics) (last visited Oct. 30, 2018).

FIGURE 1. NEWS ORGANIZATIONS AND REPORTERS FILING FEDERAL FOIA LAWSUITS, OCTOBER 2000 – NOVEMBER 2016



What has fueled this sharp rise? As shown above in Figure 1, the force that has largely driven this increase is the number of individual reporters filing suits on their own behalf, without their news organization as a co-plaintiff. Reporters filing individually now account for the majority of all media-filed federal FOIA lawsuits.

While there were a few notable exceptions,⁶ most reporters filing FOIA lawsuits brought just a single suit during this entire period. But the sheer number of individual reporters filing suits increased. A total of 17 different reporters were plaintiffs during the first 4 years of the Bush Administration. This jumped to 65 reporters who filed suit during the last four years of the Obama Administration.

The pattern for news organizations, however, was quite different. Little change has occurred in the number of different media organizations filing suits during this entire period. While the number of lawsuits filed by news organizations increased, this was largely because one news organization became increasingly active in challenging withholding by taking federal agencies to court.⁷

6. Jason Leopold, formerly of VICE News and now with BuzzFeed News, filed 32 suits, followed by New York Times reporter Charlie Savage with 14, and TRAC co-director and former New York Times reporter David Burnham with 9. See *The News Media List*, THE FOIA PROJECT, <http://foiaproject.org/plaintiff-media-list/> [https://perma.cc/BUU7-5W54] (last visited Oct. 30, 2018).

7. Just three news organizations, the New York Times, the Center for Public Integrity, and the Associated Press, accounted for one out of every three suits filed by news organizations during FY 2001-FY 2016. The New York Times was the entire source for the upsurge in news organizations suits. A total of 31 out of the 36 suits filed by the New York Times were filed during the Obama Administration, with 2/3 (20) of these filed over the last 3 years of the Obama presidency. See *The News Media List*, THE FOIA PROJECT, <http://foiaproject.org/plaintiff-media-list/> [https://perma.cc/R8HE-PN08] (last visited Oct. 30, 2018).

II. THE ORIGINS OF FOIA

The genesis of what became the Freedom of Information Act was Section 3 of the APA. That provision required agencies to publish in the Federal Register descriptions of their organizations, their functions, and substantive rules of general policy. Section 3 also required agencies to “make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.” It also contained a provision requiring the availability of “matters of official record shall in accordance with published rule be made available to persons properly and directly concerned, except information held confidential for good cause found.”⁸ Although Section 3 of the APA would become the basis for many of the publication requirements that would appear in Section 552(a)(2), the affirmative disclosure section of FOIA, the APA’s restrictions on disclosure of records “held confidential for good cause found,” or its limits on public availability only to people “properly and directly concerned” with an agency matter were sharply criticized by the House and Senate in the legislative history of the FOIA.⁹

A primary critic of the shortcomings of Section 3 was Harold Cross, a law professor at Columbia University whose book, *The People’s Right to Know: Legal Access to Public Records and Proceedings*,¹⁰ set out the case on behalf of the press for a more robust right of access to government information. Another law professor, Jacob Scher of Northwestern University, was also an important voice in the development of the press argument.¹¹ The sustained support of the press during the development of FOIA in the 1950s is referred to as the “FOI Movement.” People like Sam Archibald, who served as chief of staff for Rep. John Moss (D-CA), whose Select Committee on Freedom of Information was instrumental in developing FOIA, had been a newspaper reporter in Sacramento before he went to work for Moss.

The problems in the original FOIA quickly became apparent. Although the statute provided for *de novo* review of agency denials of requests by U.S. district courts, there were no realistic remedies for agencies’

8. Administrative Procedure Act, Pub. L. No. 79-404, 60 STAT. 237 (1946) (codified as amended at 5 U.S.C. § 552 (2018)).

9. S. REP. NO. 89-813, at 36–45 (1965), reprinted in *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE; see also H.R. REP. NO. 89-1497, at 2235 (1966), reprinted in *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE.

10. *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDING* (Harold Cross, Columbia University Press 1953).

11. 5 U.S.C. § 1002 *Change Discussed*, University of Missouri Freedom of Information Center Publication No. 45, transcript of remarks of Jacob Scher at 3d Annual Freedom of Information Conference (November 17-18, 1960) at 2–3 (1960).

failure to respond within the 10-day time limit or the broad interpretation of the exemptions by agencies. For instance, the D.C. Circuit ruled in cases like *Weisberg v. U.S. Dep't of Justice*¹² that Exemption 7, protecting law enforcement records, applied to exempt entire law enforcement files, rather than just portions of the files. In 1974, Congress moved to remedy these shortcomings, passing amendments that narrowed the coverage of Exemption 7 and Exemption 1, protecting national security. The amendments required agencies to separate non-exempt information contained in otherwise exempt records and disclose those non-exempt portions. The amendments provided several administrative fixes, including allowing requesters to sue if agencies failed to meet the 10-day statutory deadline for responding to a request or an administrative appeal, and providing for attorney's fees for successful plaintiffs as well as a public interest fee waiver. Even though the 1974 FOIA amendments passed Congress by a comfortable margin, President Gerald Ford vetoed them primarily because of concerns about the impact of the changes in Exemption 1 and Exemption 7. However, Congress easily overrode Ford's veto and the amendments became law.¹³

The administrative fixes contained in the 1974 amendments provided a real boost to the use of FOIA as a way to force federal government agencies to disclose more records. An important and enthusiastic supporter of the 1974 amendments was consumer advocate Ralph Nader, whose Public Citizen public interest advocacy group quickly became a frequent user of FOIA, including litigating under the statute. Public Citizen, representing Robert Vaughn, established an important procedural right requiring agencies to provide an index or affidavit after a requester filed suit explaining their reasons for withholding information.¹⁴ Although the press did not take the lead in litigating FOIA cases, it was often a primary beneficiary of disclosures to public interest groups, who depended on the press to more broadly disseminate its analyses of government records.

An unintended downside of the 1974 amendments was its impact on agency resources. Although Congress estimated that the cost of implementing the amendments would be no more than \$100,000, the increase in requests quickly became a drain on agency resources. In *Open America v. Watergate Special Prosecution Force*,¹⁵ a public interest group tried to enforce the statutory requirement that agencies respond within 10 days. Instead, the D.C. Circuit ruled in favor of the government, finding that an

12. *Weisberg v. U.S. Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973).

13. *Freedom of Information Act Amendments of 1974 (P.L. 93-502)*, reprinted in *Freedom of Information Act Source Book: Legislative History, Texts, And Other Documents*, COMM. ON GOVERNMENT OPERATIONS U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS, http://www.loc.gov/frd/Military_Law/pdf/FOIA-1974.pdf [<https://perma.cc/LP34-D6CK>].

14. *See Vaughn v. Rosen*, 484 F.2d 820, 826-29 (D.C. Cir. 1973).

15. *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

agency could be granted a stay of proceedings to respond to requests under unusual or exceptional circumstances. Such stays, now known as *Open America* stays, probably were inevitable as a practical matter, but the decision in *Open America* made clear that prolonged delays would be routine, making FOIA a much less attractive alternative for reporters.

III. ENCOURAGING DISSEMINATION

Regardless of what the media as an institution thought of the practical drawbacks of FOIA, the basic structure of the statute is designed to encourage its use by the press in particular, since the press traditionally has considered itself a government watchdog and, more importantly, has the means of disseminating information to a broad public audience. As a policy initiative, for FOIA to realize its full potential required encouraging its use by requesters who could then disseminate government information to the public. While Congress did not seriously consider FOIA's actual costs to executive branch agencies, it provided remedies like public interest fee waivers and recovery of attorney's fees¹⁶ as a way to prevent costs to requesters from becoming a barrier to use of the statute. The public interest fee waiver standard encouraged agencies to waive fees when disclosure of the records would primarily benefit the general public, certainly a threshold that could most easily be met by the press. The attorney's fees standard, based on a four-factor test that appeared in the Senate report but not in the statute itself included the same kind of public interest standard articulated in the fee waiver provision.¹⁷

IV. SUBSEQUENT FOIA AMENDMENTS AND THEIR IMPACT ON THE PRESS

The Reagan Administration proposed FOIA amendments that would have broadened many of the exemptions, shifted more costs on to requesters, and generally would have made it more difficult to obtain government information. Those proposals were tied up in Congress until an opportunity arose to pass a massive anti-drug bill in 1986, which included FOIA amendments to expand the law enforcement exemption. In a compromise, FOIA advocates accepted the law enforcement amendments in exchange for a substantial overhaul of the fee provisions designed to codify that groups like the press and academic institutions were to receive preferential fee treatment by prohibiting agencies from charging such requesters search fees, while commercial requesters could be charged the full cost of searching for and copying records, and all "other" requesters who did not fall into one of those categories would receive two hours of free search time and 100 pages for free. The public interest fee waiver standard was also changed to provide for waiver or reduction of fees if

16. See 5 U.S.C. §§ 552(a)(4)(A)(ii)(II),(E) (2018); see also LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, 352-53 (Harry Hammitt, Ginger McCall, Marc Rotenberg, John Verdi, Mar Zaid eds., 25th ed. 2010).

17. See 5 U.S.C. § 552(a)(4)(E) (2018).

“disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹⁸ The fee provisions were developed in the House and were intended to end agency resistance to requests by codifying those groups who should be primary beneficiaries of government information disclosure policies. By specifically identifying the news media and educational and scientific institutions as categories deserving of preferential treatment, the provisions implicitly told agencies to prioritize those kinds of requests because they were presumed to foster the public interest. Although the press did not ask for this kind of preferential treatment, questioning the wisdom of allowing agencies to decide who did or did not constitute “the press” for purposes of inclusion in the preferential fee category, it constituted a clear recognition on the part of Congress that the press was intended to be a primary beneficiary of FOIA.

Congress tasked the Office of Management and Budget (OMB) with developing guidance for the new fee categories, but the Justice Department remained the lead agency interpreting the other provisions of the 1986 FOIA amendments, including the changes in the public interest fee waiver provision. The Reagan Administration also attempted to limit the scope of organizations that could be included in the media and educational categories. Former Washington Post reporter Scott Armstrong had recently announced the creation of the National Security Archive, intended to be a sophisticated repository for records concerning national security and foreign affairs, whose primary beneficiaries would be reporters, researchers, and authors. The National Security Archive planned to use FOIA requests as a primary source of uncovering and analyzing government records. To succeed, that plan required the National Security Archive to be entitled to inclusion in the preferential fee categories. When the Defense Department denied the National Security Archive inclusion in the news media or educational fee category, the organization sued. The D.C. Circuit ruled that the National Security Archive qualified for the news media category because it planned to analyze and disseminate information.¹⁹ While the press as an institution was not actively involved in supporting the National Security Archive’s case, its outcome helped blunt government attempts to read the fee provisions more restrictively, opening the door to later inclusion of groups that could establish an ability to disseminate information to the public.

The press took a considerably more visible role in advocating for the passage of the 1996 Electronic FOIA amendments, with press organizations like the Society for Professional Journalists and the American Society of Newspaper Editors marshaling their organizations in support of legisla-

18. *See* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 16, at 15 (quoting 5 U.S.C. 552(b)(7)).

19. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1388 (D.C. Cir. 1989).

tion that codified agency obligations to search and disclose electronic records and provided a series of carrots and sticks for agencies to encourage compliance with the statutory time limit.²⁰ In an attempt to resolve the intractable backlogs at some agencies, the EFOIA amendments explained that an agency could no longer rely on a routine backlog to justify its failure to respond in a timely fashion, but, instead, when challenged by a plaintiff, the agency had to persuade the court that exceptional circumstances existed and that the agency had demonstrated reasonable progress in efforts to reduce its backlog. The amendments also allowed agencies to use multi-track queues that differentiated between requests that could be processed quickly and those that were more complex and would require more time.

The EFOIA amendments included a new mechanism providing for expedited processing when the requester was able to “demonstrate a compelling need” for the information. A “compelling need” was defined as either “a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” or “with respect to a request made by a person primarily engaged in disseminating information, [an] urgency to inform the public concerning actual or alleged Federal Government activity,” a standard originally developed by the Department of Justice.²¹ The second prong of the definition for qualifying for expedited processing clearly referred to the press, although it has also been applied to organizations that can show the ability to disseminate information.

As early as 1974, amendments added annual reporting provisions requiring agencies subject to FOIA to provide basic information on the number of requests denied and the reasons for denying requests. The Justice Department was charged with providing information pertaining to the amount of attorney’s fees assessed against the government and was also instructed to provide guidance encouraging agencies to comply with FOIA.²² As a result of its role in providing agency guidance, the Justice Department issued Attorney General’s memos interpreting the 1974 and 1986 amendments. Further, starting with the Ford Administration, succeeding administrations issued Attorney General’s memos explaining the

20. See LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 16, at 15–19.

21. See 5 U.S.C. § 552(a)(6)(E)(v)(I)–(II) (2018).

22. See 5 U.S.C. § 552(e)(6)(A) (providing current codification of the provision). Starting with the EFOIA amendments, Congress has added additional requirements to the annual reporting provisions every time it has amended FOIA. When the annual report requirement was originally added in 1974, agencies provided their reports to the House and Senate committees with jurisdiction over FOIA — the Senate Judiciary Committee and the House Government Operations Committee. The EFOIA amendments expanded the role of the Justice Department in receiving and making publicly available annual reports. The FOIA Improvement Act of 2016 provided yet additional new reporting requirements, resulting in a slight renumbering of the provision instructing the Justice Department to encourage agency compliance.

way in which they intended to approach FOIA implementation. Generally, those memos issued by Republican administrations emphasize the ability of agencies to withhold information, while those issued by Democratic administrations emphasize that agencies should use their discretion to disclose as much information as possible, guided by whether they can articulate a foreseeable harm if information is disclosed. Congress codified the “foreseeable harm” test in the FOIA Improvement Act of 2016.

These changing attitudes towards FOIA implementation had a noticeable impact on the press after the 2001 terrorist attacks. Because Attorney General John Ashcroft’s FOIA memo committed the Justice Department to defend any reasonable agency decision to withhold information, some members of the media, particularly the Associated Press, became more active in pursuing FOIA litigation.

The press was also a major advocate of creating a FOIA ombudsman, who would focus on mediating disputes between requesters and agencies short of litigation. Support for an ombudsman at the federal level grew based on the success of ombudsman-like models at the state level, particularly Connecticut’s FOI Commission and the New York Committee on Open Government.²³ The Office of Government Information Services (OGIS), part of the National Archives & Records Administration, was created as part of the 2007 OPEN Government Act.²⁴ The push for the creation of OGIS by the press and open government advocates was fueled by the desire to create an alternative to litigation. Requesters may file complaints with OGIS after they have received an adverse determination by an agency. Such a complaint can be filed either after an initial denial determination or after the denial of the requester’s administrative appeal to the agency. Regardless, OGIS will then attempt to resolve the dispute through mediation with the agency. However, the agency is not required to agree with OGIS’s findings and if a requester is dissatisfied with the outcome of OGIS mediation, the requester may still file suit in district court. When OGIS was created as part of the 2007 OPEN Government Act, it was not given the power to issue binding opinions; however, in the FOIA Improvement Act of 2016, the ability to issue non-binding opinions was added.²⁵

A primary reason the press supported the creation of OGIS was to create an administrative agency that would serve as an alternative to litigation and, hopefully, would build a body of administrative decisions favorable to disclosure. The Justice Department opposed its creation from the beginning, and almost immediately after President George W. Bush signed the OPEN Government Act into law, the government tried to kill the office by defunding it. Part of the support for the FOIA Improvement

23. See Harry Hammitt, *Mediation Without Litigation*, NAT’L FREEDOM OF INFO. COALITION (2007), https://nfoic.org/sites/default/files/hammitt_mediation_with_out_litigation.pdf [<https://perma.cc/72JQ-K749>].

24. See LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 16, at 19–22.

25. See 5 U.S.C. § 552(e)(6)(h).

Act of 2016 by the press and open government advocates was to ensure that OGIS remained funded.

A primary concern of open government advocates in the legislation that culminated in the OPEN Government Act was to repair the damage caused by the Supreme Court's ruling in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*,²⁶ on the availability of attorney's fees under statutes such as FOIA. To be eligible for an award of attorney's fees under FOIA, plaintiffs must show that they have substantially prevailed, which includes a finding that the litigation served as a catalyst to the agency's decision to provide records. But under *Buckhannon*, the Supreme Court ruled that for purposes of such fee-shifting provisions a plaintiff prevailed only if awarded some relief by the court. *Buckhannon* was quickly applied to FOIA,²⁷ requiring a legislative fix codifying the catalyst theory.²⁸

While fixing the damage caused by *Buckhannon* was a primary concern for open government advocates, another provision updating what constituted news media for purposes of qualifying for preferential fee treatment was added as well. Free-lance journalists were specifically identified as were entities engaging in "electronic dissemination" of news, and members of the "alternative media."²⁹

Aside from expanding OGIS's role and further updating the annual reports provisions, the FOIA Improvement Act of 2016 also codified the "foreseeable harm" test for all exemptions³⁰ and prohibited agencies from claiming the deliberative process privilege for records older than 25 years.³¹

V. CONCLUSION

While the press was consistently involved in supporting a right to access government records during the two decades between the passage of the Administrative Procedure Act in 1946 and the Freedom of Information Act in 1966, after the law took effect in 1967 the press often seemed conspicuously absent in actually using FOIA. Journalist Bob Woodward was famously quoted as explaining that he preferred to rely on leaks or unauthorized disclosures of government records rather than the cumbersome of FOIA. That attitude was certainly reinforced by the intractable delays and backlogs that became a hallmark of what then-law professor Antonin Scalia referred to as the Taj Mahal of unintended conse-

26. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 643 (2001).

27. See *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 464-66 (D.C. Cir. 2002).

28. See 5 U.S.C. § 552(a)(4)(E).

29. See 5 U.S.C. § 552(a)(4)(A)(ii).

30. See 5 U.S.C. § 552(a)(8)(A).

31. See 5 U.S.C. § 552(b)(5).

quences.³² But regardless of public perceptions, FOIA works more often than not and millions of records have been added to the public domain because they were disclosed under FOIA. Because of the delays inherent in FOIA, the statute does not work well for deadline reporters. But investigative journalists working on books or longer projects have successfully used FOIA to provide more depth to their analysis.

A new generation of journalists has come to recognize that FOIA litigation can yield useful results as well. Reporters like Jason Leopold, formerly at VICE News and now with BuzzFeed News, have led a resurgence in the willingness of reporters to pursue FOIA litigation. Traditionally, such litigation has often fallen victim to a lack of financial support from newspapers, magazines, or broadcast outlets. But with the advent of a new generation of public interest attorneys willing to take on these cases for only the prospect of an attorney's fees award at the end, the financial barriers have diminished, allowing some reporters to pursue judicial remedies that were not financially viable in the past. Further, more law schools have established public interest law clinics that use FOIA litigation themselves and frequently include reporters among their clients. Other sources willing to cover litigation costs have also played a role. Having a reporter as a co-plaintiff allows organizations that may not readily qualify for the news media fee category entrée to that benefit. The James Madison Project has teamed up with reporters from a variety of publications bolstering its ability to qualify for news media fee status. Finally, The New York Times Vice President and Deputy General Counsel, David McCraw, has made it a policy to support reporter-initiated FOIA litigation as a cost-effective way to ensure its ability to access government records.³³ While the press has been absent far too long as an active participant in enforcing its FOIA rights, its sudden surge in litigation is a welcome sign for a statute that in many ways was designed to encourage its use by the press.

32. See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY, Apr. 11, 1982, <http://www.aei.org/publication/the-freedom-of-information-act-has-no-clothes/> [Permalink unavailable].

33. See David McGraw, *Think FOIA is a Paper Tiger? The New York Times Gives It Some Bite*, N.Y. TIMES, June 13, 2017, <https://www.nytimes.com/2017/06/13/insider/foia-freedom-of-information-act-new-york-times.html> [<https://perma.cc/3CEE-2PPW>].